In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-84

DARRELL WALKER, PETITIONER

v.

PETER J. BRENNAN, SECRETARY OF LABOR

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 24-36) is reported at 477 F. 2d 292. The memorandum opinion of the district court (Pet. App. 14-23) is reported at 336 F. Supp. 1355.

JURISDICTION

The judgment of the court of appeals (not reproduced by petitioner) was entered on April 9, 1973. The petition for a writ of certiorari was filed on July 9, 1973. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).[1]

[1] Through error or inadvertence, petitioner seeks to invoke jurisdiction under this Court's Rule 19(1)(b).

QUESTION PRESENTED

Whether employment agencies are ineligible for the "retail concept" exemption under Section 13(a)(2) of the Fair Labor Standards Act.

STATUTE INVOLVED

The pertinent provisions of the Fair Labor Standards Act of 1938, 52 Stat. 1060, as amended, 29 U.S.C. 201 *et seq.*, are set forth in the appendix to the petition for a writ of certiorari (pp. 37-38).[2]

STATEMENT

Petitioner is engaged in the business of operating employment agencies under various names in Alabama and Tennessee (Stip., A. 20-21).[3] During the period in controversy, the combined annual gross volume of all agencies in which petitioner had an interest exceeded $250,000. These agencies obtain information about job openings, advertise such openings in the newspapers, interview and take written applications from persons seeking employment, and refer qualified applicants to prospective employers (A. 40-43, 53-54; Stip., A. 23-24). Many persons were employed by petitioner in the described activities, but they were neither paid in accordance with the minimum wage provisions of the Fair Labor Standards Act, nor were their hours of work recorded as required by the Act. Petitioner claimed

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[2] In addition, petitioner has reproduced certain sections of the Age Discrimination in Employment Act (Pet. App. 38-39). Although the Secretary's complaint in this case also charged, and the trial court found, ADEA violations, petitioner raised no question concerning that aspect of the case in the court of appeals, and is thus precluded from doing so now, as he apparently recognizes.

[3] "A." references are to the appendix in the court below which has been lodged with the Clerk.

that compliance was not required of him, pleading, as an affirmative defense, the "retail or service establishment" exemption provided in Section 13(a)(2) of the Act. The district court upheld this affirmative defense, largely on the basis of petitioner's "proof" that there is a distinction "between the retail employment agency business where agencies, such as [petitioner's], seek to place individual employees directly in contact with employers, and the wholesale employment agency business where wholesale agencies seek to place a large group of potential employees in contact with other agencies which have contacts with potential employers" (Pet. App. 21, n. 3).

The court of appeals reversed, noting that petitioner's "so-called expert testimony" resembled that offered in the loan company cases (*Aetna Finance Co.* v. *Mitchell,* 247 F. 2d 190 (C.A. 1), and *Mitchell* v. *Kentucky Finance Co.,* 359 U.S. 290), and reflected nothing more than the "disposition (in a more or less rough analogy borrowed from the mercantile field) to refer to small loans to individuals as 'retail financing' in contrast to 'wholesale' lending institutions which dealt with industry through either buying accounts receivable or financing inventories" (Pet. App. 30-31). Of controlling significance, the court of appeals held, was the fact that "[f]rom the inception of the Act, employment agencies have been on the Administrator's non-exempt list" because they lack the requisite retail concept (Pet. App. 33).

ARGUMENT

The decision below is correct, is consistent with decisions of this Court construing the phrase "retail or service establishment" as used in the Act, and does not conflict with any decision of another court of appeals. Further review by this Court is thus unwarranted.

1. Under the Act, no business concern is a "retail or service establishment" unless its sales or services meet the retail concept contemplated by Section 13(a)(2). The holding below that the job placement services rendered by employment agencies are not "retail" services is consistent with this Court's observations that "not everthing the consumer purchases can be a retail sale of goods or services" (*Idaho Metal Works* v. *Wirtz*, 383 U.S. 190, 203; *Mitchell* v. *Kentucky Finance Co.*, 359 U.S. 290, 295), and that the term "service establishment" is limited to establishments which "are comparable to the local merchant, corner grocer or filling station operator" (*Roland Co.* v. *Walling*, 326 U.S. 657, 666; *Phillips Co.* v. *Walling*, 324 U.S. 490, 497).

The decision also accords with the longstanding administrative position that employment agencies are not "sufficiently similar in character to retail establishments to be considered 'service establishments' within the meaning of Section 13(a)(2)" (Interpretative Bulletin No. 6, issued June 16, 1941, and reissued in 29 C.F.R. 779.317) (Pet. 9; Pet. App. 40). Since this administrative interpretation, like the one involved in *Kentucky Finance*, *supra*, was both outstanding when the Act was amended in 1949 and not inconsistent with those amendments, it bears the unique imprimatur of Section 16(c) of the 1949 Amendments which expressly provided that any existing "order, regulation or interpretation of the Administrator of the Wage and Hour Division or of the Secretary of Labor * * * shall remain in effect * * * except to the extent that [it] may be inconsistent with the provisions of this Act" (63 Stat. 920; 29 U.S.C. 208, Note). In addition to the *Kentucky Finance* decision, 359 U.S. at 292, see *Maneja* v. *Waialua Agricultural Co.*, 349 U.S. 254, 270, and *Steiner* v. *Mitchell*, 350 U.S.

247, 255. Also, as the court below noted, the "decisions of the only two other courts which have considered this matter have found employment agencies non-exempt", referring to *Schussler* v. *Employment Consultants, Inc.*, 333 F. Supp. 1387 (N.D. Ill.), and *Yunker* v. *Abbye Employment Agency, Inc.*, 32 N.Y.S. 2d 715, 723 (N.Y.C. Mun. Ct.) (Pet. App. 35-36).

2. Contrary to petitioner's assertion, the purpose of Congress in amending Section 13(a)(2) in 1949 was not to provide a "more liberal definition" or to "change the law so that sales of goods or services *not* consumed in the home could now qualify as retail sales" (Pet. 9). On the contrary, the single purpose of the 1949 amendment to Section 13(a)(2), as explained by Senator Holland (the sponsor of this amendment in the Senate), was to eliminate the so-called "business use" test (see dicta in *Roland Co.* v. *Walling*, 326 U.S. 657) by making it clear "that a business sale does not necessarily have to be a nonretail sale" (95 Cong. Rec. 12495-12497; see also 95 Cong. Rec. 12506-12508, 14931). In other words, as this Court has pointed out, the purpose of the amendment was not "to broaden the fields of business enterprise to which the exemption would apply," but "[r]ather, it was time and again made plain that the amendment *was intended to change the prior law only by making it possible for business enterprises otherwise eligible under existing concepts to achieve exemption* even though * * * their sales were to other than private individuals for personal consumption" (*Mitchell* v. *Kentucky Finance Co., supra*, 359 U.S. at 294; emphasis added). See also *Arnold* v. *Ben Kanowsky, Inc.*, 361 U.S. 388, 391-392; *Aetna Finance Co.* v. *Mitchell*, 247 F. 2d 190, 193 (C.A. 1).

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

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